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No. 92-1008

In The

Supreme Court of the United States

October Term, 1992

JEROME K. SUPPLE, DANIEL S. OUELLETTE, DANIEL N. MATHESON, III, THOMAS R. KOWALSKI, JANE C. MONDAY, WILLIAM L. CUNNINGHAM, W.C. PERRY, NORMAN D. ELDER, CLYDE C. WADDELL, JR. BECKY R. ESPINO, TOM BURDENSKI,

Petitioners,

v.

HAYS COUNTY GUARDIAN, JEFFREY STEFANOFF, VICKI HARTIN, WEBB BRANEN, JOE GADDY, JODY DODD, JOE PTAK, ROBERT MARTINEZ, and JOHN DEMAREE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondents do not believe that this case presents either of the Questions set forth in Petitioners Application for Writ of Certiorari and that those questions can not be decided on this record.

Respondents restate the questions presented as follows:

1. The Question Of Non-Discriminatory Restrictions On Commercial Advertising Is Not Presented By The Opinion Below Or By The Record.

2. The Decision By The Court Of Appeals That The Outdoor Grounds Of A University Constitute A Designated Public Forum Does Not Conflict With An Opinion From This Court Or From Any Other Circuit.

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Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, The Hays County Guardian, et al., ("Guardian") respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That opinion was decided on August 10, 1992 and is reported at 969 F.2d 111 (5th Cir. 1992).

I.

STATEMENT OF FACTS

The Respondents adopt the Petitioners Statement of Facts with the following revisions and corrections:

SWTSU is not, even under its own policies, an enclave without commercial activity. While SWTSU actively encourages and promotes the sale and the offer for sale of a wide range of goods, OL 09.05, appx. at 53-57,[1] it seeks to burden newspapers (other than its own) with substantially more onerous rules than those enforced against other commercial products. OL 09.05 § 2.05(a), appx. at p. 54.

Southwest Texas State University ("SWTSU") is the seventh largest public institution of higher learning in the State of Texas. Merchandise, such as candy, soft drinks and the like are widely available for sale on campus. Rec., Tr. Vol. I, p. 141/ln. 7-16. "Yellow page" advertising and the like are found throughout the campus. Rec., Tr. Vol. I, p. 142/ln. 23 -p. 143/ln. 19.

The University publishes its own student newspaper, the *University Star* (*"Star"*). SWTSU imposes no restrictions on the *Star,* either as to advertising or as to where it may be distributed on campus. *Hays County Guardian v. Supple,* 969 F.2d 111, 120 (5th Cir. 1999) (*"Guardian* II") appx. at 13. The *Star* carries advertisements which are identical to those carried in the *Guardian. Hays County Guardian v. Supple,* C.A. No. A-90-CA-203 (W.D. Tex. 1991)

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[1] Appendix citations are to the appendices contained in the Petition for Writ of Certiorari.

(*Guardian* I), appx. at p. 33 (FOF 30: "The *Star* competes for and publishes commercial advertising identical to the advertising found within the *Guardian*.") The *University Star* "contains a greater number and density of advertisements than the *Guardian*." *Guardian II*, 969 F.2d at 120, appx. at 13.

Prior to August 31, 1989 the *Guardian* was allowed free access to the University. On that date a small group of university officials met without notice to the *Guardian* and determined to "reinterpret" the University's regulations against soliciting. For the first time the University began enforcing its ban on soliciting (that is, any sale or offer for sale of merchandise, OL 9.05, appx. at 53) in such a manner as to include free newspapers such as the *Guardian*.

II.

REASONS FOR DENYING CERTIORARI

1. The Question Of Non-Discriminatory Restrictions On Commercial Advertising Is Not Presented By The Opinion Below Or By The Record.

A. Advisory Opinion

In their First Question, Petitioners call upon this Court to delineate the "ability of a state university to restrict the distribution of commercial advertising on campus" [Petition, First Question Presented]. In order to claim this question Petitioners presume four issues. First, they presume that Southwest Texas State University has an inflexible rule that no commercial activity is allowed

on its' campus. Second, they argue that no newspaper is allowed to distribute in the campus market if it contains advertising. Third, they presume that the Court of Appeals has forbidden lawful control of commercial speech. Fourth, they claim that the newspaper in question, the *Guardian,* is one with no purpose other than to propose commercial transactions. As Respondents show below the record does not support any of these assumptions.

Since these premises do not, in fact, present themselves on this record the Court is not in a position to issue "guidance" [Petition at p.7] to the defendants' on how best to preclude the dissemination of ideas on the SWTSU campus. Put another way, the Petitioners simply request an improper advisory opinion, *Montana v. Imlay,* ___ U.S. ___ 113 S.Ct. 444, 445 (1992) (Justice Stevens, concurring); *Flast v. Cohen,* 392 U.S. 83 (1950), on how best to skirt the First Amendment's prohibition on governmental intrusion into the commerce of information which the Founders sought to protect.

B. First Presumption: No Commercial Activity.

Both the Court of Appeals and the District Court found that commercial activity is ubiquitous on the SWTSU campus. The *University Star* carries advertising that is identical to that carried by the *Guardian. Guardian II,* 969 F.2d at 120, appx. at 8. Given the broad availability of advertising at SWTSU, the Petitioners' free speech

discrimination must be rejected. See, *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 473 (1988)("Our advertising cases have never distinguished among various modes of written advertisements to the general public.")[2]

In this case newspapers competing with the University's newspaper are singled out and confined to remote locations on this large urban campus because they contain print advertisements about products, many of which are directly available for sale on campus. These are often the same advertisements contained in the University's "student" newspaper. (Rec., Tr. Vol. I, p. 141/ln. 716). As this Court said in *Martin v. City of Struthers*, 319 U.S. 141, (1943):

> Freedom to distribute information to every citizen whenever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the

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[2] And as *Shapiro* notes, *Bates v. State Bar of Arizona*, 433 U.S. 350, 372, n.26 (1977) equates advertising in telephone directories with newspaper advertising. *Shapiro*, 486 U.S. at 473. Yellow page advertising is not banned from the SWTSU campuses. (Rec., Tr. Vol. 1, pp. 142/ln. 23-143/ln. 19.)

> Constitution, the naked restriction on the dissemination of ideas.

Martin, 319 at 146-47.

Here, the university seeks to forbid distribution of newspapers (other than its own) while at the same time allowing the underlying commercial transactions that its rules refuse to allow advertising for. It singles out the independent press for treatment not generally applicable to other enterprises on campus. *Compare* OL 09.05 §2.02(a) (distribution of newspapers) *with* §2.02(b) (sale of food items), §2.02(c) (distribution of the *University Star* and other publications) and §2.02(m) (advertisements in University publications), appx. at 54-56. It is true that the First Amendment does not prohibit all regulations of the press; however, the Free Press Clause does forbid singling out the press for treatment that is discriminatory. *Minn. Star & Tribune v. Minn. Com'r of Rev.*, 460 U.S. 575, 581 (1983) ("[D]ifferential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional.")

C. Second Presumption: No Distribution On Campus.

The University argues that adult students must be protected from themselves.[3] SWTSU claims (without support in the record) that university students are: "[M]ore

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[3] Since the age of majority in Texas is eighteen, the overwhelming number of these students are adults.

affluent than the population generally, more inclined to 'discretionary spending'," and that they are "concentrated together in a small area, [and thus they] constitute a tempting market for sellers". Petition at 8.

Only by denigrating the hard work, long hours and personal sacrifice of the vast majority of students who struggle to obtain their degree could the Court adopt defendants' reasoning. But what weight would this argument carry? Only a *sub-silentio* challenge to the free market system, the same market system that the *University Star* relies upon for its continued existence. The transparency of the University's argument is especially evident when the Court recalls that the University newspaper runs identical advertisements to the ones which SWTSU claims are harmful in competing newspapers.

We know that the free market of ideas is the quintessential market in American society.[4] That is, the rights of free speech and press are upheld to promote and preserve a "free trade of ideas." *Abrams v. United States*, 250 U.S. 616, 630 (1919). Freedom of speech "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

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[4] Even in the elementary/high school setting, much less with regard to adult college students, a school board "may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." *Board of Educ., Island Trees Union Free School, District No. 26 v. Pico*, 457 U.S. 853, 879 (1982) (Blackman, concurring).

It is this market that SWTSU seeks to minimize. The First Amendment and this Court's jurisprudence will not allow such a result, especially not on the campus of an institution of higher learning. *Papish v. Board of Curators*, 410 U.S. 677, 670 (1973). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press . . . ". *Thomas v. Collins*, 323 U.S. 515, 545 (1945) (Jackson, J., concurring). Are we to presume (without record evidence) that college students need protection above and beyond that of the general population from print advertisements? And if we are, how do we reconcile the *University Star's* far more extensive distribution of identical ads. *Guardian II*, 969 F.2d at 120, appx. at 13.

The University's underinclusive regulation is broadly unconstitutional and the Court of Appeals so found.

> The University places no restrictions on the *University Star*, a paper that contains a greater number and density of advertisements than the *Guardian*. Twelve thousand copies of each issue of the *Star* were distributed on the campus. This underinclusiveness cuts against the assertion that restricting commercialism on campus was an interest of paramount importance to the University or at least an interest that required a flat prohibition on an entire medium of distribution.

Guardian II, 969 F.2d at 120, appx. at 13. See also *Carey v. Brown*, 447 U.S. 455 (1980)(ordinance against residential picketing found to be under-inclusive because it exempted labor picketing); and, *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace

of ideas in which truth will ultimately prevail, rather than to countenance monopolism of that market, whether by the Government itself or a private licensee.")

D. Third Presumption: Lawful Control Of Advertising Precluded.

When government seeks to restrain a channel of speech, it must be shown that the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 763 (1988), *citing, Grayned v. Rockford*, 408 U.S. 104, 116 (1972). See also, *Fane v. Edenfield*, 945 F.2d 1514, 1517 (11th Cir. 1991), cert. granted ___ U.S. ___, 112 S.Ct. 2272 (1992). No such showing is present on this record. Given the *University Star's* distribution of identical ads no such showing could have been made. *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 93-94 (1977).

Plaintiffs concede that an appropriate governmental agency may legitimately prevent illegal activity even on the part of a newspaper. *Pittsburgh Press Co. v. Pittsburgh Com'n on Human Relations*, 413 U.S. 376 (1973); *Law Students Civ. Rts. Research Council, Inc. v. Wadmond*, 401 U.S. 154 (1971). Where the newspaper is not involved in the illegal activity the issue is more complex. The inclusion of information in a newspaper is the last place that government should look to prevent the dissemination of inappropriate information. That is, the general approach must be that the advertiser itself should be the party under scrutiny. Cf. *Bigelow v. Virginia*, 421 U.S. 809 (1975). Only where the newspaper can be charged with conspiring to

engage in unlawful activity, *Pittsburgh Press*, 413 U.S. at 387, may government attack the messenger rather than the message itself.

If the University – or any other state entity – believes that a particular advertisement is false or misleading, it may preclude that ad's distribution and thereby test the reasonableness of such a ban. Cf. *Head v. New Mexico Board*, 374 U.S. 242 (1963). It may even have the authority to ban literature which contains such ads. *Posadas De Puerto Rico Ass'n v. Tourism Co.*, 478 U.S. 328 (1986). But it may not issue a blanket prohibition against the dissemination of nongovernmental news sources simply because one of these entities might someday contain such an ad. In the analogous circumstance of the electronic press, Chief Justice Burger has held that, because a broadcast entity has First Amendment protection, the government has little power to interfere with the editorial decision to accept or reject advertisements. *C.B.S., Inc. v. Democratic Nat. Com.*, 412 U.S. 94, 120-21 (1973).

E. Fourth Presumption: Newspaper Is Commercial Speech.

The Press Clause of the First Amendment provides protection separate and apart from the Speech Clause of the First Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). "In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy." *New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (Justice Black, concurring).

> A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.

Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 258 (1974) (footnote omitted). In Justice Stewart's words "[t]he primary purpose of the constitutional guarantee of a free press was . . . to create a fourth institution outside the Government as an additional check on the three official branches." P. Stewart, *"On Freedom of the Press,"* 26 Hastings L. J. 631, 634 (1975). "Thus the press serves and was designed to serve as a powerful antidote to any abuse of power by governmental officials and as a constitutionally chosen means for helping officials elected by the people be responsible to all the people whom they were selected to serve." *Mills v. Alabama,* 384 U.S. 214, 219 (1966).

This right extends to the editorial function of advertising.

> The power of a privately owned newspaper to advance its own political, social and economic views is bounded by only two factors: First, the acceptance of a sufficient number of readers – and hence advertisers – to assure financial success; and, second, the journalistic integrity of its editors and publishers.

C.B.S., Inc., 412 U.S. at 117 cited with approval in *Miami Herald*, 418 U.S. at 255. "The press cases emphasize the special and constitutionally recognized role of that institution in informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978) (footnote omitted). See also *Red Lion*, 395 U.S. at 390.

The university may not merely label the *Guardian* commercial and thus ban it. State labels are not dispositive of the degree of speech protection. *Bigelow*, 421 U.S. at 826. But, even though it contains commercial advertisements with lower protected status on the First Amendment ladder, *Board of Trustees of State Univ. of N.Y. v. Fox*, ___ U.S. ___, 109 S.Ct. 3028, 3033 (1989), that does not make the commercial speech the lowest-common-denominator in the speech equation. Where traditional and commercial speech are intertwined the Court must determine whether the fully protected speech is the significant communication or whether it is simply an after thought tacked on to a sales pitch. *Fox*, 109 S.Ct. at 3031.

In the instant cause, the record is undisputed that speech of the highest order is at stake. *Miami Herald*, 418 U.S. at 258; *Discovery Network, Inc. v. City of Cincinnati*, 946 F.2d 464, 467, n.4 (6th Cir. 1991), cert. granted *sub nom. Cincinnati, Ohio v. Discovery Network, Inc.*, ___ U.S. ___, 112 S.Ct. 1290 (1992). While the *Guardian* does contain advertisements, nevertheless these advertisements are not the purpose of the paper. *See, Valentine v. Chrestensen*, 316 U.S. 52 (1942) as analyzed in *Pittsburgh Press*, 413 U.S. at 385. The purpose of the newspaper is to

report on issues concerning peace, justice and the environment. *Guardian II*, 969 F.2d at 120, appx. at 14. Such traditional First Amendment speech (or speech significantly intertwined with traditional speech) is fully protected. *Riley v. Nat'l Federation of the Blind of N.C.*, 487 U.S. 781 (1988).

The press, of course, cannot long publish without financial support. Income is generally obtained by, among other things, seeking and accepting commercial advertising. Given these parameters it is clear that, at least where the press is considered[5], the "speech" of the publisher so outweighs the commercial aspects of the advertisements that the amalgamation must be evaluated on a "pure" speech basis. *Riley*, 487 U.S. at 796. ("[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech.") *See also, Meyer v. Grant*, 486 U.S. 414, 442, n. 5 (1988); and *Discovery Network*, 946 F.2d at 467, n.4

The Petitioners reject this analysis based upon a tortured reading of *Fox*. That case is not dispositive of the cause *sub judice*. First, freedom of the press is specifically addressed in the Constitution, Tupperware – brand plastic storage container parties (the event addressed in *Fox*) are not. Why did the framers of the First Amendment add press rights after speech rights? Is the Press Clause a redundancy? Obviously not. Second, as demonstrated above, freedom of the press requires more than that

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[5] And where no "illegal" conduct is undertaken. *Pittsburgh Press*, 413 U.S. at 385.

newspapers be allowed editorial independence. They must have financial independence. They cannot achieve this independence without resort to advertising. Put another way: "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell v. City of Griffin, Ga.* 303 U.S. 444, 452 (1938).

II.

2. The Decision By The Court Of Appeals That The Outdoor Grounds Of A University Constitute A Designated Public Forum Does Not Conflict With An Opinion From This Court Or From Any Other Circuit.

A. Designated Public Forum

The Board of Regents of the Texas State University System have promulgated the following rule:

> *Speech on University Grounds.* Any group or person, whether or not a student or employee, and whether or not invited by a registered student, faculty, or staff organization, may assemble and engage in free speech activities on the grounds of the campus.

Guardian II, 969 F.2d at 117, appx. at 7. The "University's operating letter 9.06, § 2.02 allows any "student . . . [to] publicly distribute *outdoors, on grounds owned or controlled by the University,* petitions, handbills, or pieces of literature that are not obscene, vulgar, or libelous, or that do not contain impermissible solicitation." *Id.* at 7-8 (emphasis in original). And, of course, the *University Star* is granted unlimited distribution. *Id.* at 8. No clearer description of a designated public forum could be possible.

The Court of Appeals found, based on this evidence, that "the University deliberately fosters an environment in which students may freely distribute newspapers, pamphlets, and other literatures concerning public affairs outdoors, on grounds owned or controlled by the University," subject only to the limits necessary to preserve the academic mission and maintain order. *Id.*

This finding is both logically and intuitively correct. That is: (1) the University has chosen to open itself as a forum; (2) the University places no restrictions on the *University Star* newspaper which contains similar ads to those found in the *Guardian;* and (3) the University allows widespread sale and offer for sale of merchandise on campus (restricting only newspapers other than the *University Star* to five remote locations).[6]

Alternatively, the university, or at least significant portions of it, is designated by the Texas Constitution as public. *See, Jones v. Memorial Hospital System,* 746 S.W.2d 891 (Tex. App. – Houston [1st Dist.] 1988, no writ) and *Right to Life Advocates, Inc. v. Aaron Women's Clinic,* 737

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[6] The University allows widespread advertising in the *University Star;* it provides ample space in virtually every building for sale of candy, soft drinks, etc. by vending machines; it allows unregulated solicitation throughout campus by "yellow page" advertising, and it does not seek to censor television, radio, telephone and/or fax advertising. Thus, the result of the Petitioners rule is singular: It precludes small, underfunded publications such as the *Guardian* from reaching their intended audience with no incremental benefit in "protecting" the adult faculty and students of the University from being exposed to (protected) commercial information. At the very least this renders the regulation underinclusive.

S.W.2d 564 (Tex. App. – Houston [14th Dist.] 1987, writ denied), *cert. denied*, ___ U.S. ___, 109 S.Ct. 71 (1988). *Jones* and *Right to Life Advocates* establish that, under Texas law, even a private corporation significantly "involved in state and federal activity" is treated as "a public entity for purposes of upholding the state constitutional right of free speech." *Jones*, 746 S.W.2d at 896. *Right to Life Advocates* adopts and follows *New Jersey v. Schmid*, 423 A.2d 615 (N.J. S.Ct. 1980) *appeal dismissed sub. nom., Princeton University v. Schmid*, 455 U.S. 100 (1981). *Schmid* in turn applies state open forum analysis to a private university campus and requires that freedom of speech be allowed unhindered. *See*, P. Linzer, *Why Bother With State Bills of Rights*, 68 Tex. L. Rev. 1573, 1599 (1990).

If the Texas Constitution makes SWTSU an open forum it cannot be doubted that it is a public forum by designation. *Community for Creative Non-violence v. Turner*, 893 F.2d 1387, 1391 (D.C. Cir. 1990). No higher authority in Texas law exists to establish such a designation. It is beyond debate that this Texas case law applies to the distribution of newspapers. *Houston Chronicle Pub. Co. v. City of Houston*, 620 S.W.2d 833, 837 (Tex.Civ.App. – Houston [14th Dist.] 1981, no writ); *Ex Parte Neil*, 222 S.W.923, 924 (Tex. 1893).

This being so, SWTSU cannot limit free access in the designated public forum portions of the university. "Regulation of such property is subject to the same limitations as that governing a traditional public forum." *Intern. Soc. For Krishna Consciousness v. Lee*, ___ U.S. ___, 112 S.Ct. 2701, 2705 (1992).

> The [United States] Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place. Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as applied in a traditional public forum.

Perry Education Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45-6 (1983). Once a forum is generally open, government can not pick and choose the type of expressive activity allowed simply by whim.[7] *Searcey v. Harris*, 888 F.2d 1314, 1324 (11th Cir. 1989).

"While it is proper to weigh the need to maintain the dignity and purpose of a public building, or to impose special security requirements, other factors may point to the conclusion that the Government must permit wider access to the forum than it has otherwise intended." *U.S. v. Kokinda*, ___ U.S. ___, 110 S.Ct. 3115, 3125 (1990) (Kennedy, concurring) (citations omitted). *See also Guardian II*, 969 F.2d at 117, appx. at p. 5. Having opened the campus for expressive activity by students and non-students alike, the university cannot withdraw a portion of these rights – that is the right to pass out newspapers – except by establishing that its actions are reasonable time, place and manner restrictions. *U.S. v. Grace*, 461 U.S. 171 (1983);

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[7] Even in a non-forum the government must demonstrate that its actions are reasonable. *Board of Airport Comm'rs v. Jews For Jesus*, 482 U.S. 569 (1987). This is so even for leafletting. *Lee*, 112 S.Ct. at 2713 (O'Connor, J. concurring). Regulation of newspapers in non-public forums must be particularly reasonable. *Sentinel Communication Co. v. Watts*, 936 F.2d 1189, 1205-07 (11th Cir. 1991).

Acorn v. St. Louis County, 930 F.2d 591, 594 (8th Cir. 1991). Thus, Petitioners claim that the ruling below "sharply curtails the university's ability to restrict other *protected expressive activity* . . . in outdoor locations," Petition at p. 13 (emphasis supplied), is both clearly correct and totally beside the point.

First, the Petitioners are correct that the First Amendment is specifically designed to limit government's powers to restrain what Petitioners admit is, "protected expressive activity". The Amendment accomplishes its very purpose if it does, in fact, provide free access to information on the SWTSU campus. But it is to this conclusion that the Petitioners lodge their real objection. That is, this university takes exception to the very genius of the Bill of Rights.

SWTSU must acknowledge that the expressive activity it seeks to limit (i.e., advertising) is widely disseminated throughout the campus by the university using the university sponsored and controlled newspaper as its vehicle and revenue collector. If government can, within the limits of the First Amendment, distribute (and monopolize) such income-generating ads while at the same time denying other newspapers their very existence then the independence of the Fourth Estate must be written off. But such is not the jurisprudence of the First Amendment. Cf. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981).

The degree of First Amendment protection is not diminished even where newspapers are sold rather than given away. *Heffron v. Internat'l Soc. for Krishna Consciousness*, 452 U.S. 640, 647 (1981); *Schaumburg v. Citizens for a*

Better Environment, 444 U.S. 620, 632 (1980); *Pittsburgh Press*, 413 U.S. at 385; *Murdock v. Penn.*, 319 U.S. 105, 111 (1943). How then can the *Guardian's* First Amendment rights be diminished when it simply includes truthful ads which are already made available on campus by the university itself.

Second, the University's claim is beside the point because the Fifth Circuit did not preclude it from restricting improper or inappropriate activity even if it would otherwise be sanctioned by the First Amendment. As the Court below carefully stated, the designated forum in question remains "subject to the limits necessary to preserve the academic mission [of the University] and to [its'] need to maintain order." *Guardian II*, 969 F.2d at 117, appx. at 8. See also, *Metromedia, Inc.*, 453 U.S. at 516.

B. No Conflict With This Court's Precedents

Petitioners claim a conflict between the reasoned decision below and this Court's precedents. Yet no such conflict appears in Petitioners' Brief. *Widmar v. Vincent*, 454 U.S. 263 (1981), is cited as conflicting with the panel decision below. But that case affirmatively states:

> This Court has recognized that the campus of a public university, at least for its students, possesses many of the characteristics of a public forum. "The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas'." Moreover, the capacity of a group or individual "to participate in the intellectual give and take of campus debate . . . [would be] limited by denial of access to the customary media for communicating with the

> administration, faculty members, and other students." We therefore have held that students enjoy First Amendment rights of speech and association on campus, and that the "denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes" must be subjected to the level of scrutiny appropriate to any form of prior restraint.

Widmar, 454 U.S. 263 at n. 5 (citations omitted). See also, *Healy v. James*, 408 U.S. 169 (1972) and *Kleindienst v. Mandel*, 408 U.S. 753, 763 (1972) (the right to free speech "is 'no where more vital' than in our schools and universities.")

C. No Inter-Circuit Conflict.

The Petitioners cite *Planned Parenthood v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) as compelling "a different result if applied to this case." Petitioner's Brief at p. 15. Even a cursory review of *Planned Parenthood* demonstrates that it is not in conflict with the result challenged here. Rather, *Planned Parenthood* fully supports the ruling below.

To be sure, *Planned Parenthood* is driven by different facts. It involves curtailing high school (juvenile) student rights.[8] The *Guardian* is directed to adults. *Planned Parenthood* involves an advertiser's demand for access to a

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[8] The Court has recently articulated the difference between the First Amendment's effect on adults and it's effect on minors. See, *Sable Communications of Calif., Inc. v. F.C.C.*, ___ U.S. ___ 109 S.Ct. 2829, 2836 (1989). Put in *Planned Parenthood* terms: "In light of the nature of the [high school] environment, educators must have the ability to consider the 'emotional maturity of the

school-sponsored publication. *Planned Parenthood,* 941 F.2d at 822. The *Guardian* is an entity totally independent of SWTSU.[9] The high school in question treated all publications alike. *Id.* at 823. SWTSU allows the *University Star* to carry ads which are identical to those in the *Guardian*. Nonetheless, the *Star* distributes without University interference while the *Guardian* is threatened by legal action.

Based on these critical distinctions alone, it is clear that *Planned Parenthood* does not represent a conflict with the opinion below. Nevertheless it is also important to point out why *Planned Parenthood* affirmatively supports (rather than opposes) the result in *Guardian II.*

Planned Parenthood found as an evidentiary matter that there was no evidence "to demonstrate the 'clear intent to create a public forum' [as] was present in other public forum cases". *Planned Parenthood,* 941 F.2d at 823. In a footnote, the court carefully analyzed this Court's precedent upholding designated open forums (*Id.* at n. 9)

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intended audience' as well as the authority to refuse to 'associate the school with any position other than neutrality on matters of political controversy'." *Planned Parenthood,* 941 F.2d at 829.

[9] *Planned Parenthood* sought to force its ad into a school sponsored newspaper which was part of the schools' education mission. "When 'school-sponsored' speech can fairly be characterized as part of the schools' mission . . . the first amendment affords educators 'greater control' in deciding when the school will affirmatively 'promote' or 'lend its name and resources' to particular speech. *Planned Parenthood,* 941 F.2d at 828 (citations omitted). The *Guardian,* of course, bears no imprimatur of SWTSU. If there were confusion about the *Guardian's* distinction from the university, the newspaper (possibly more than the SWTSU) would wish to make its independence clear.

and noted that its result would be different were such evidence found in the record. *Id.* at 825 ("We agree that a high school may create a public forum or designate a forum for limited purposes".)

Second, *Planned Parenthood* requires analysis of the most important factor in the public forum debate. "When identifying the relevant forum, we focus 'on the access sought by the speaker'." *Planned Parenthood,* 941 F.2d at 822, n. 5 (citations omitted). In *Planned Parenthood* access was sought to the high school newspaper. In the cause *sub judice* the forum is the outdoor areas of a large urban campus.

In the final analysis "each public forum case is unique on its facts". *Id.* at 822. *Planned Parenthood* is distinct factually and intellectually from the issues under consideration here. Thus, it cannot constitute a conflict with the holding below.

D. Traditional Open Forum

Because it found that the University has designated the grounds of its campus as an open forum the Court below did not reach the issue of whether the SWTSU campus is a traditional open forum. However, in *Glover v. Cole,* 762 F.2d 1197 (4th Cir. 1985) the Fourth Circuit reached and resolved this very question, finding that a university campus is open for expressive conduct by all members of the public. See also *Jones v. Board of Regents of the University of Arizona,* 436 F.2d 618 (9th Cir. 1970). As this Court recognized in *Rust v. Sullivan,* ___ U.S. ___, 111 S.Ct. 1759, 1776 (1991), a "university is a traditional

sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment." Thus, if a question had existed as to the designation of the outdoor grounds at SWTSU as an open forum, the Court of Appeals would necessarily have had to conclude that the campus was a traditional open forum.

III.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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